Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

PAUL ANTHONY RANGOLAN,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

On Petition for A Writ of Certiorari To the United States Court of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Court of Appeals may issue a stay of removal only if the petitioner meets the standard for issuance of an injunction contained in 8 U.S.C. 1252(f)(2): a showing "by clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law." 8 U.S.C. 1252(f)(2).

2. Whether the reference in 8 U.S.C. 1252(a)(2)(D) to "questions of law" encompasses claims involving the application of law to fact. In particular, whether a challenge to the Board of Immigration Appeal's "more likely than not" determination raises a "question[] of law" within the meaning of § 1252(a)(2)(D), or instead raises only a factual claim that does not fall within that provision and strips the Courts of Appeals of jurisdiction to review Board decisions.

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OPINION BELOW

The Fourth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The decision is currently not reported in Westlaw. The pertinent rulings are reprinted in the Appendix at A and D.

JURISDICTION

The Fourth Circuit filed its decision on October 23, 2007 and entered an order denying petitioner's motion for rehearing on November 21, 2007. This Court granted petitioner until March 11, 2008 to file a petition for a writ of *certiorari*. This Court has jurisdiction under 8 U.S.C. § 1252(a)(1) to review the Circuit Court's decision on a writ of *certiorari*.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1252(a)(2)(D)

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. § 1252(f)(2)

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

STATEMENT OF FACTS

The petitioner, Paul Anthony Rangolan, is a native and citizen of Jamaica who became a lawful permanent resident of the United States in 1984. In January 1999, the U.S. Department of Homeland Security ("DHS") executed an order of removal against petitioner and deported him to Jamaica based on a finding that he had committed an aggravated felony offense, conviction for embezzlement of funds as a bank employee. He reentered the United States in March 1999 after being persecuted for being a homosexual in Jamaica. The Government conducted an interview regarding petitioner's claim of persecution on December 14, 2006 and found that he had established a reasonable fear of return to Jamaica. App. G.

On February 16, 2007 and March 6, 2007, the petitioner, Paul Anthony Rangolan, presented testimony from his two United States citizen sisters

and himself in support of the documentary record containing his application for relief from removal pursuant to Article 3 of the Convention Against Torture. On March 6, 2007, Immigration Judge Wayne R. Iskra found as follows:

> Therefore, it is the opinion of the Court with respect to the main issue in this case, whether or not the respondent is a homosexual, that he has met his burden to prove that he is a homosexual. With respect to a nexus between the respondent being a homosexual and his application for relief under the provisions of Section 241(b)(3) withholding of removal, it is the opinion of the Court that the respondent is a member of a particular social group, and the case cited by the Government attorney wo· ld be the applicable case, *Matter of Toboso-Alfonso*, Int. Dec. 3222. That case has held that an applicant who had the status of being a homosexual both established his membership in a particular social group and demonstrated that his freedom was threatened within the meaning of the Act. So it is the opinion of the Court that the respondent is a member of a particular social group.
>
> * * *
>
> With respect to deferral of removal, it is the opinion of the Court that the respondent has met his burden to prove that it would be more likely than not that he

would suffer torture if removed to Jamaica. I have taken into consideration the background documents submitted by the respondent in the nature of articles, but most importantly the Country Reports for Human Rights Practices published by the State Department on March 8, 2006. That report states that the offenses against the person's act prohibit acts of gross indecency, generally interpreted to be any kind of physical intimacy between men in public or in private, which are punishable by ten years in prison. Although Prime Minister Patterson stated that the country would not be pressured to changes its antihomosexual [sic] laws, in October a parliamentary committee met and proposed a debate on that issue. The report also goes on to list individuals who were homosexuals who were killed, and also that in December a homophobic mob allegedly chased a homosexual off a pier where he drowned.

I have also taken into consideration the fact that I did find credible that the respondent was chased and beaten by an antihomosexual [sic] mob and that he would have no recourse to the government of Jamaica. I have also taken into consideration, with respect to the State Department Report section on torture, that although the law prohibits such practices, reports of physical abuse of prisoners by guards continued despite efforts of the government to remove abusive guards and

> improve procedures. This lists instances where individuals who are apprehended and detained are tortured. It is the opinion of the Court that if the respondent were returned to Jamaica that it would be more likely than not based upon his history as being a homosexual that he would commit homosexual acts and would be subject to imprisonment for that act and tortured.

App. C; Administrative Record ("A.R.") at 93-102.

In support of his applications for relief from removal, the petitioner submitted a letter from the Jamaican Embassy in Washington, D.C. that states clearly that the only way Mr. Rangolan can live in Jamaica is if he "conceal[s] [his] sexual body language to prevent future assault" and that he should be aware that homosexual acts are considered criminal in the eyes of Jamaican law. App. F; A.R. at 308.

Other documents submitted by Mr. Rangolan reveal that, even when confronted by murder of homosexuals, the government of Jamaica is loathe to prosecute or even investigate such an act. The Human Rights Watch Report of November 2004, entitled "Hated to Death: Homophobia, Violence and Jamaica's HIV/AIDS Epidemic" clearly states the situation for homosexuals and persons with HIV/AIDS in Jamaica. A.R. at 316-396. Human Rights Watch found that "[p]olice not only harass and persecute people suspected of homosexual conduct, sex workers, and people living with

HIV/AIDS. They also interfere with HIV/AIDS outreach to them." A.R. at 334. Regarding the issue of torture at the hands of and with the acquiescence of government officials, Human Rights Watch reported that "police participated in the abuse that ultimately led to this mob killing, first beating the man with batons and then urging others to beat him because he was homosexual." A.R. at 335. Human Rights Watch also noted that "[p]olice abuse is a fact of life for many men who have sex with men and women who have sex with women in all of the communities that Human Rights Watch visited in Jamaica. As in the incident described above, homophobic police violence can be a catalyst for violence and abuse by others." A.R. at 336.

Human Rights Watch noted that the "[d]iscriminatory police practices, fear that their homosexuality might be publicized, the paucity of available legal assistance, and the possibility of being prosecuted themselves combine to keep men who have sex with men from filing complaints or seeking redress when they are victims of extortion." A.R. at 342-43. The report notes that a "number of witnesses said that they thought that some element of their outward behavior, dress, or appearance was the motivation for police to arrest or detain them." A.R. at 341. The Human Rights Watch Report notes that even the "Police Public Complaints Authority, the independent state authority charged with investigating allegations of police abuse" refuse to investigate allegations of police abuse of homosexuals. A.R. at 345.

The study by Ruth C. White published in Culture, Health & Sexuality, dated July 4, 2005, entitled "Homosexuality and HIV/AIDS stigma in Jamaica," notes that "[s]exuality-based oppression in Jamaica is institutionalized throughout the legal system, health and social welfare institutions, popular media and culture, and, through extreme social stigma." A.R. at 399. Indeed, the article notes that the "Jamaican government has **overtly sanctioned homophobia by including homophobic messages in their year-2002 political campaigns.**" *Id.* (Emphasis supplied).

On April 5, 2007, the DHS filed an appeal from the Immigration Court's decision, stating that the Immigration Court erred in granting deferral of removal "as it was based upon nothing more than respondent allegedly being homosexual." A.R. at 86-88. On April 12, 2007, Mr. Rangolan, through undersigned counsel, filed a motion to summarily dismiss the DHS appeal as failing to comply with the regulations governing such filing. A.R. at 67-72.

In an appeal brief filed after an extension of the briefing schedule before the BIA, the DHS raised a new issue, claiming that Petition failed to sustain his burden to demonstrate that it was more likely than not that he would be tortured as a homosexual upon return to Jamaica and claiming that the Immigration Court's finding that he had done so was based on pure speculation and not on anything substantive in the Record of Proceedings. A.R. at 16-37. The Board of Immigration Appeals ("BIA") adopted the rationale in the DHS brief in

sustaining the Government's appeal, reversing the grant of deferral of removal to Jamaica, and ordering Petitioner's removal from the United States to Jamaica. App. B.

The Fourth Circuit, in an order dated October 23, 2007, granted the Government's motion to dismiss on jurisdictional grounds. App. A. The Government argued that whether the facts of petitioner's case satisfy the legal standard for deferral of removal (the "more likely than not" standard) raised only a factual claim, and thus does not fall within the Fourth Circuit's renewed petition-for-review jurisdiction over "questions of law." *See* 8 U.S.C. § 1252(a)(2)(D). The Government's position is contrary to the decisions of several Circuits which have held that claims involving the application of law to fact such as Petitioner's present reviewable questions of law. *See infra*, at I. The issue is one of far-reaching importance regarding the jurisdiction of the federal courts and arises in an area with life and death consequences for petitioners seeking CAT relief.

The Fourth Circuit also denied the petitioner a stay after it granted the Government's jurisdictional motion. The Government argued that the proper standard for a stay is the heightened standard set forth in 8 U.S.C. § 1252(f)(2). With the exception of the Eleventh Circuit, every Circuit Court to address the question regarding the proper standard for a stay in removal cases (eight circuits to date) has rejected the Government's position that the heightened standard in § 1252(f)(2) applies. *See*

infra, at I. There is no question that the petitioner satisfies the traditional standard for a stay, given that he raises a novel jurisdictional question on which the majority of Circuit Courts have rejected the Government's position. Moreover, the Immigration Court granted Petitioner relief in accordance with the Convention Against Torture, the BIA overturned the IJ decision in a perfunctory manner, and the balance of hardships clearly favors Petitioner in this case which involves his possible death at the hands of agents of the government of Jamaica. This is critical given the fact that only four months after the BIA, on August 16, 2007, overturned the IJ decision that the petitioner faced torture on return to Jamaica based on his homosexuality, on December 18, 2007, the BIA, with two of the same panel members, found that public officials in Jamaica clearly target homosexuals for persecution and police refused to intervene or investigate abuse of homosexuals because such persons are considered *persona non grata* in Jamaica and unworthy of protection. App. E.

It is noteworthy that both in the order of October 23, 2007 denying the motion for stay and dismissing the petition for review, as well as the order of November 21, 2007 denying the petition for rehearing and emergency motion for stay, Judge Gregory dissented from the decision and indicated, without opinion, that he would grant the motion for stay, the motion for rehearing, and deny the Government's motion to dismiss the petition for review. App. A, D. Clearly, Judge Gregory found that the Fourth Circuit had jurisdiction to consider

the petition for review and found that Petitioner's case warranted a stay of removal pending a decision in the case on its merits.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHAT STANDARD IS REQUIRED FOR ISSUANCE OF A STAY OF REMOVAL PENDING A DECISION ON A PETITION FOR REVIEW.

The circuit courts have overwhelmingly rejected the Government's position that 8 U.S.C. § 1252(f)(2) provides the proper standard for a stay of removal. Without clarification of the appropriate stay standard, Petitioner, and others like him, may be wrongly denied stays of removal and removed to countries where they will face serious injury or even death.

Eight out of the nine circuit courts to consider this issue have squarely rejected the Government's position that a court of appeals may issue a stay of removal only if the petitioner meets the standard for issuance of an injunction contained in 8 U.S.C. § 1252(f): a showing "by clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law." 8 U.S.C. § 1252(f). *Compare Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Mohammad v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002); *Douglas v. Ashcroft*, 374 F.3d 230, 234

(3d Cir. 2004); *Tesfamichael v. Gonzales*, 411 F.3d 169, 172-76 (5th Cir. 2005); *Bejjani v. INS*, 271 F.3d 670, 688-89 (6th Cir. 2001); *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005); *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004); *Andrieu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (en banc) *with Weng v. U.S. Att'y General*, 287 F.3d 1335, 1337-38 (11th Cir. 2002). *See also Bonhomme-Ardouin v. U.S. Att'y General*, 291 F.3d 1289, 1290 (11th Cir. 2002) (Barkett, J., concurring) (calling for *en banc* reconsideration of *Weng*).

As Judge Easterbrook recognized in *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005), the Government's argument that § 1252(f) supplies the correct standard for stay requests is supported neither by the statutory language nor by common sense. He emphasized that there is a "long-standing distinction" between a "stay" and an "injunction" that is uniformly reflected not only in the U.S. Code and the Federal Rules of Appellate Procedure but specifically in 8 U.S.C. § 1252. *Hor*, 400 F.3d at 484, 485.

Neither does the heightened § 1252(f) standard urged by the Government make sense as a practical matter, for many petitioners facing persecution or torture who ultimately prevail on the merits would have their stay requests denied under that standard. Although such aliens could continue to litigate their petitions for review from abroad, "[t]he ability to come back to the United States would not be worth much if the alien has been maimed or murdered in the interim. Yet under the Attorney General's reading of § 1252(f) an alien who

is likely to prevail in this Court, and likely to face serious injury or death if removed, is not entitled to remain in this nation while the Court resolves the dispute." *Id.* at 485.

II. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS WHETHER A CHALLENGE TO THE DECISION BY THE BIA ABOUT THE LIKELIHOOD OF TORTURE IS A QUESTION OF LAW OR IS ONLY A FACTUAL CLAIM THAT IS OUTSIDE THEIR JURISDICTION FOR CRIMINAL ALIENS THAT ARE ONLY ELIGIBLE FOR DEFERRAL OF REMOVAL.

In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court engaged in a lengthy historical analysis of habeas corpus and, based on that analysis, concluded that the Suspension Clause "required" review of deportation orders. *Id.* at 300. Most important to the case at bar, the Court made clear that habeas review in the executive detention context encompassed not only claims regarding the proper "interpretation" of statutes, but also claims regarding the "application" of statutes. *Id.* at 302. *See Ramadan v. Gonzales*, 479 F.3d 646, 652 (9th Cir. 2007); *Chen v. Dep't of Justice*, 471 F.3d 315, 327-28 (2d Cir. 2006). *See also* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. Sch. L. Rev. 133, 139-42 (2006) (to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over

"application" questions and those involving "regulations").[1]

Prior to the passage of the REAL ID Act, the Circuit Courts regularly held that the traditional scope of habeas review encompasses questions concerning the application of law to fact. *See Singh v. Ashcroft*, 351 F.3d 435, 442 (9th Cir. 2003) (habeas jurisdiction was available over Singh's claim "even if that claim does not raise a 'purely legal question of statutory interpretation,'" because habeas jurisdiction has historically encompassed the "application" of law to fact); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003) ("[h]abeas relief is traditionally available to correct 'errors of law, including the erroneous *application* or interpretation of statutes'") (citing *St. Cyr*, 533 U.S. at 302); *see also Wang v. Ashcroft*, 320 F.3d 130, 142-43 (2d Cir. 2003).

With the guidance of *St. Cyr*, the Courts of Appeals have continued to hold subsequent to the REAL ID Act that claims that were previously cognizable in habeas, including the application of law to fact, remain reviewable. *See, e.g., Jean-Pierre v. Attorney General*, 500 F.3d 1315 (11th Cir. 2007) (concluding that the court had jurisdiction to review an alien's CAT claim "in so far as he

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[1] *St. Cyr* also left no doubt that habeas review also encompassed legal questions concerning *regulations*. Indeed, one of the habeas cases on which the Supreme Court relied upon most heavily – *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) – involved a claim under a regulation, not a statute. *See St. Cyr*, 533 U.S. at 307 (citing *Accardi*).

challenges the application of an undisputed fact pattern to a legal standard"); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006) (concluding that a "determination involving the application of law to factual findings . . . presents a reviewable decision" under the REAL ID Act); *Chen*, 471 F.3d at 326-27 ("We construe . . . the REAL ID Act . . . to encompass the same types of issues that courts traditionally exercised in habeas review"); *Kamara v. Attorney General*, 420 F.3d 202, 211, 213-15 (3d Cir. 2005) (finding that the scope of review under REAL ID Act "mirrors" the scope of habeas review and exercising jurisdiction over BIA's application of regulatory standard to facts); *see also, Kolkevich v. Attorney General*, 501 F.3d 323, 335 (3rd Cir. 2007) (Holding that the REAL ID Act was intended to preserve judicial review for all aliens in proceedings, including those with criminal convictions.)

The Second Circuit agreed with the Third Circuit's holding in *Kolkevich, supra* that the REAL ID Act applied to those persons with criminal convictions. *Ruiz-Martinez v. Mukasey*, ____ F.3d ____ (2nd Cir. February 14, 2008) WL 383228 *Slip opinion* at 13. Indeed, the Second Circuit noted from the House Report on the REAL ID Act that:

> [u]nder section 106, all aliens who are ordered removed by an immigration judge will be able to appeal to the BIA and then raise constitutional and legal challenges in the courts of appeals. No alien, **not even criminal aliens, will be deprived of judicial review of such claims**. Unlike AEDPA and

> IIRIRA, which attempted to eliminate judicial review of criminal aliens' removal orders, section 106 would give every alien one day in the court of appeals, satisfying constitutional concerns. The Supreme Court has held that in supplanting the writ of habeas corpus with an alternative scheme, Congress need only provide a scheme which is an "adequate and effective" substitute for habeas corpus. Indeed, in *St. Cyr* ..., the Supreme Court recognized that "Congress could, without raising any constitutional questions, provide an adequate substitute through the court of appeals." By placing all review in the courts of appeals, [the REAL ID Act] would provide an "adequate and effective" alternative to habeas corpus.
>
> H.R.Rep. No. 109-72, at 174-75, U.S.Code Cong. & Admin. News 2005, pp. 240, 299-300 (internal citations omitted)

(emphasis added). *Id.*

Critically, some courts of appeals have continued subsequent to the REAL ID Act to find reviewable an alien's claim that he satisfies the CAT "more likely than not" standard. *See, e.g., Toussaint v. Attorney General*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) ("The question here involves not disputed facts but whether the facts, even when accepted as true, sufficiently demonstrate that it is more likely than not that she will be subject to persecution or torture upon removal to Haiti. Therefore, we have jurisdiction to review the BIA's

application of law to the facts of this case."). *See also, e.g., Jean-Pierre v. Attorney General*, 500 F.3d 1315 (11th Cir. 2007) (concluding that the court had jurisdiction to review alien's CAT claim "in so far as he challenges the application of an undisputed fact pattern to a legal standard"); *Chen v. Dep't of Justice*, 471 F.3d 315, 332 n.10 (2d Cir. 2006) (noting that a challenge to an IJ's determination under CAT that an alien was not more likely than not to be tortured was a claim of erroneous application of law). The Seventh Circuit reached the opposite conclusion. *See Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005); *c.f. Eke v. Mukasey*, 512 F.3d 372, 377 (7th Cir. 2008) (Noting that after having established that an alien in expedited removal proceedings was convicted of an aggravated felony offense, it had jurisdiction to review the legal standards applied by the IJ and BIA *de novo*.)

In short, habeas review has traditionally encompassed claims involving the application of law to fact. A construction of the REAL ID Act that would preclude all review over these types of claims would thus trigger far-reaching constitutional concerns.

Nothing in the text of § 1252(a)(2)(D) compels the conclusion that the statute applies only to a subset of legal claims. The text of § 1252(a)(2)(D) provides for review of "questions of law." The term is unqualified. It does not state that only statutory questions are reviewable, thereby excluding claims involving regulations. Nor does it refer only to questions of "interpretation" or to "pure" questions

of law, thereby excluding questions involving, as here, the *application* of statutes or regulations. Because nothing in the text of § 1252(a)(2)(D) compels the conclusion that the statute applies only to a subset of legal claims, it is "fairly possible" (*St. Cyr*, 533 U.S. at 300) to construe the statute to avoid the grave constitutional questions that would be raised by a statute limiting review to a narrow set of claims involving pure statutory construction. *See also* H.R. Rep. No. 109-72, at 174-75 (2005) (Conf. Rep.) (stating that the "purpose of [new § 1252(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas").

The Fourth Circuit's conclusion that it lacked jurisdiction over Mr. Rangolan's petition raises serious constitutional concerns, conflicts with the text of 8 U.S.C. 1252(a)(2)(D), and is in direct conflict with the holdings of the courts of appeals in numerous circuits that have concluded that claims involving application of law to fact such as those raised by Mr. Rangolan present reviewable "questions of law."

Further, even if the Government were correct that the "more likely than not" determination raises a factual issue, the BIA committed clear legal error by applying an incorrect standard of review – raising a question of law reviewable by the courts of appeals under 8 U.S.C. 1252(a)(2)(D). The BIA exceeded its scope of review by engaging in a *de novo* review of the facts presented to the Immigration Court, without stating specifically whether the Immigration Court's findings were clearly erroneous. *See*, 8 C.F.R. § 1003.1(e)(3)(i).

Given the voluminous evidence in the Record of Proceedings that (1) Petitioner is a homosexual male with HIV+ status and (2) the culture and law in Jamaica is clearly hostile towards homosexuality (to the point that reggae stars call for the deaths of homosexuals in their lyrics with impunity and the death of one gay leader by a reggae star was treated with indifference by the government of Jamaica), it is clear that the BIA engaged in *de novo* review of the facts of this case and came to a different conclusion. *C.f.* 8 C.F.R. 1003.1(e)(3)(ii) (Permitting *de novo* review of "questions of law, discretion, and judgment and all other issues in appeals from decision of immigration judges.") This is a reviewable error of law, and the Fourth Circuit erred in dismissing Mr. Rangolan's petition for lack of jurisdiction.

Indeed, the Government, at all levels in this case, failed to address the language contained in the letter from the Embassy of Jamaica in Washington DC which enhances Petitioner's claim that the government knows of his status as a homosexual with HIV+ status and that the criminal law would be imposed against him should he fail to conceal what he is in public. To ignore the evidence in the record and then claim that the evidence is insufficient is tantamount to a denial of due process. The advocacy of such a circular argument does nothing to advance the rule of law and, rather, only serves to undermine it.

Furthermore, the Seventh Circuit recently held that forcing a person requesting withholding of removal to Nigeria based on his status as a person

convicted of drug-related offenses to demonstrate that a Nigerian law would be enforced against him was ludicrous – "Short of presenting himself to Nigerian authorities and waiting to see their reaction, we do not fathom how, at this juncture, Bosede could do more than take at face value the State Department's evidence that Decree 33 has not fallen into desuetude." *Bosede v. Mukasey*, 512 F.3d 946, 952 (7th Cir. 2008). The Seventh Circuit went further and found that the failure of the Immigration Judge in that case to consider all of the evidence presented by Bosede in support of his claim for relief from removal to rise to the level of a denial of due process.

Thus, for the BIA to claim that there is insufficient evidence that the government of Jamaica would target the petitioner in this case and enforce the criminal law against homosexual behavior is a denial of due process that should be addressed at the Circuit Court level and the Fourth Circuit's holding that it lacks jurisdiction to do so is erroneous.

CONCLUSION

The Court should grant the petition for a writ of *certiorari* and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 23, 2007

No. 07-1838
A41-830-049

PAUL ANTHONY RANGOLAN

Petitioner

v.

PETER D. KEISLER,
Acting United States Attorney General

Respondent

ORDER

Petitioner has filed a motion for stay of deportation, and respondent has filed a response to the motion. Respondent has filed a motion to dismiss, and petitioner has filed a response to the motion.

The motion for stay of deportation is denied, and the motion to dismiss is granted.

Entered at the direction of Judge Traxler with the concurrence of Judge Niemeyer. Judge Gregory

voted to grant the motion for stay and to deny the motion to dismiss.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX B

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

File: A41 830 049 – Arlington, VA Date: AUG 16 2007

In re: PAUL ANTHONY RANGOLAN

IN ASYLUM PROCEEDINGS

APPEAL

ON BEHALF
OF APPLICANT: Linda A. Dominguez, Esquire

ON BEHALF OF DHS: Adam L. Goldman
Assistant Chief Counsel

APPLICATION: Convention Against Torture

The Department of Homeland Security (DHS) appeals the Immigration Judge's decision dated March 6, 2007, which granted the applicant's application for deferral of removal under the Convention Against Torture (CAT), 8 C.F.R. § 1208.17 (2007). The request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7). The appeal will be sustained and the Immigration Judge's decision vacated in part.

The applicant, a native and citizen of Jamaica, argues that he is eligible for deferral of removal under the CAT, asserting that he is a homosexual male who is HIV-positive; that he will be identified as such; that he will be arrested and imprisoned for committing homosexual acts; and that while in prison

he will be tortured. For an act to constitute "torture" for purposes of the CAT, it must be: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions. *See Matter of J-E-*, 23 I&N Dec. 291, 297 (BIA 2002); 8 C.F.R. § 1208.18(a).

The Immigration Judge found that the applicant met his burden of proving a likelihood of torture if removed to his home country (I.J. at 8-9). Specifically, the Immigration Judge determined that the applicant was a homosexual; and that, if returned to Jamaica, it was more likely than not that he would commit homosexual acts; that he would be subject to imprisonment for such acts; and that he would be tortured (I.J. at 6, 9). We agree with the DHS that the Immigration Judge's conclusion is based on a series of unsupported suppositions, and that the record does not establish that it is more likely than not that any torture the applicant may suffer in Jamaica would be by or at the acquiescence of the government. *See Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006).

We acknowledge that the United States Department of State Country Report on Human Rights Practices (Report) for Jamaica for 2005 indicates that the Offenses Against the Person Act prohibits acts of physical intimacy between men, which are punishable by imprisonment (Exh. 3, Tab F at 5). However, there is little evidence of record as to the extent to

which this law is enforced. In fact, evidence submitted by the applicant indicates that it is impossible to determine how frequently the law is enforced (Exh. 3, Tab G at 21-25). Therefore, we cannot conclude that it is more likely than not that the applicant would in fact be arrested and prosecuted under this law. *See Matter of M-B-A-*, 23 I&N Dec. 474, 478-80 (BIA 2002).

Similarly, the record does not establish that it is more likely than not that, if arrested and imprisoned, the applicant would be tortured by or at the acquiescence of the Jamaican government. The 2005 Report states that male inmates who are deemed to be, or who admit to being, homosexual are held in a separate facility (Exh. 3, Tab F at 5). There were numerous reports of violence by both wardens and other inmates, though few inmates sought recourse through the system (Exh. 3, Tab F at 5). The Report states, however, that the law prohibits torture and that the government had made efforts to remove abusive guards and improve prison procedures (Exh. 3, Tab F at 2). In addition, the government generally cooperated with human rights and other groups who monitored the prisons (Exh. 3, Tab F at 2). *See generally Matter of T-M-B-*, 21 I&N Dec. 775, 779 (BIA 1997) (the Department of State's country profile is generally entitled to considerable deference); *Gonahasa v. INS*, 181 F.3d 538, 544 (4th Cir. 1999) (a State Department report on country conditions is highly probative evidence in an asylum case). We also note that the Report for 2006 shows that, although violence against

known or suspected homosexuals continued, the Jamaican government investigated and prosecuted reported incidents, and, with respect to two prior high-profile murder cases, made arrests and secured a conviction with a life sentence. In addition, the government instituted a process to investigate allegations of physical abuse of inmates by prison guards. The government was also working to reduce the stigma of HIV/AIDS. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (the Board may take administrative notice of commonly known facts or the contents of official documents). Therefore, although problems persist, we cannot conclude on this record that the Jamaican government has instigated or been willfully blind to the violence aimed at homosexuals. *See Matter of J-E-, supra*; *Lopez-Soto v. Ashcroft,* 383 F.3d 228, 240 (4th Cir. 2005) (government "acquiescence" includes willful blindness). Accordingly, the following orders will be entered.

ORDER: The Department of Homeland Security's Appeal is sustained, and that part of the Immigration Judge's decision dated March 6, 2007, which granted deferral of removal under the Convention Against Torture is vacated.

FURTHER ORDER: The applicant is ordered removed to Jamaica.

/s/ Patricia A. Cole
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Arlington, Virginia

File No.: A 41 830 049 March 6, 2007

In the Matter of	)	
RANGOLAN, PAUL ANTHONY,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: The respondent had been ordered removed pursuant to Section 238(b) of the Act or the INS has initiated a prior exclusion/deportation or removal order of the above named alien pursuant to 241(a)(5) of the Act.

APPLICATIONS: Withholding of removal under the provisions of Section 241(b)(3) of the Act; withholding of removal under the provisions of Article 3 of the United Nations Convention against Torture; and deferral of removal under the provisions of Article 3 of the United Nations Convention against Torture.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Linda A. Dominguez	Adam Goldman Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is an adult native and citizen of Jamaica. The respondent in fact has been previously deported from the United States and illegally entered the United States. That issue is not contested by either party. The respondent, both parties conceded, would not be eligible, statutorily, for asylum based upon his conviction of being an aggravated felon. The respondent is seeking withholding of removal to Jamaica, and in order to be eligible for this relief under the provisions of Section 241(b)(3), respondent must prove that his life or freedom would be threatened in Jamaica on account of his race, religion, nationality, membership in a particular social group, or political opinion. In order to make this showing, the respondent must establish a clear probability of persecution on account of one of the enumerated grounds. This clear probability standard requires a showing that it is more likely than not that the respondent would be subject to persecution if returned to the country from which he seeks withholding. The law provides, that if the respondent has been convicted of a particularly serious crime, that the respondent would not be statutorily eligible for withholding of removal under the provisions of Section 241(b)(3).

With respect to relief under the provisions of Article 3 of the United Nations Convention against Torture, the respondent must prove that it will be more likely than not that he would be subject to torture in Jamaica by the instigation of or with the acquiescence of public officials or those acting in an official capacity. Unlike asylum, which requires a showing of nexus, the respondent need not establish that the torture was on account of any particular ground.

As I stated, the applicant for withholding of removal under the Torture Convention bears the burden of proving that it would be more likely than not that he or she would be tortured if removed to Jamaica. If an Immigration Judge determines that the respondent is more likely than not to be tortured in Jamaica, the applicant for withholding of removal under the Torture Convention shall be granted unless the respondent is subject to a ground of mandatory denial. The grounds of mandatory denials are as follows: for applications filed after April 1, 1997 withholding of removal must be denied if an alien is deportable under 237(a)(4)(D) of the Act; 2) if the alien ordered, incited, assisted or otherwise participated in persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion; 3) if the alien having been convicted by final judgement of a particularly serious crime is a danger to the community of the United States; 4) there are serious reasons to believe that the alien committed a serious nonpolitical crime

outside the United States before the alien arrived in the United States; and 5) that there are reasonable grounds to believe that the respondent is a danger to the security of the United States.

If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by the preponderance of the evidence that such ground does not apply.

Now in evaluating this case with respect to the Torture Convention, I have applied the definition of torture contained in 8 C.F.R. Section 208.18(a)(1)-(8). If an alien is not eligible for withholding of removal under provisions of Article 3 of the United Nations Convention against Torture, the alien shall be granted deferral of removal to Jamaica where he or she is more likely than not to be tortured if the alien has been ordered removed and the alien is entitled to protection under the Convention against Torture and the alien is subject to the mandatory denial of withholding of removal pursuant to 8 C.F.R. Sections 208.16(b)(2) or (b)(3).

Deferral of removal does not confer upon the respondent any lawful or permanent Immigration status in the United States. If the respondent is subject to the custody of the Department of Homeland Security, deferral of removal would not result in his or her being released from custody. Deferral of removal may be terminated by the Court if the Court later determines that it is not likely that the respondent would

be tortured in Jamaica. The Department of Homeland Security Director, with jurisdiction over the alien whose removal has been deferred, must file a motion fulfilling certain requirements with the Immigration Court to schedule a hearing to consider whether deferral of removal should be terminated.

Termination of deferral of removal can also occur if the Attorney General, through the Secretary of State, has received diplomatic assurances from Jamaica that the respondent would not be tortured if the respondent were removed to that country. The Attorney General must decide whether the assurances are sufficiently reliable to allow the alien's removal to that country, consistent with Article 3 of the Convention against Torture. Deferral of removal is applicable only to the country to which it has been determined the alien is likely to be tortured and, thus, an alien may be removed to any other country where he or she is not likely to be tortured.

The respondent and the respondent's two sisters have testified under oath with respect to the respondent's applications for relief. The respondent also submitted numerous documents which this Court has considered, which include the State Department *Country Report* concerning the treatment of homosexuals in Jamaica. The Court has also received and taken into consideration the criminal history of the respondent, which is contained in the sentencing report conviction records.

With respect to the testimony of the respondent's two witnesses, the sisters, I find that their testimony is credible. With respect to the testimony of the respondent, I have taken into consideration the offenses for which he has been convicted including the fraud offenses, and it is my opinion that the respondent's testimony with respect to one of the main issues in the case, the fact that he claims he is a homosexual, is credible. His testimony with respect to that issue in my opinion has been detailed and consistent and corroborated by the credible testimony of the respondent's sisters. I have not taken into consideration any mannerisms of the respondent in arriving to conclusion that he is a homosexual.

With respect to the Government's concerns on that issue, that the respondent did marry a female and had a child from another female, it is the opinion of the Court that although that has taken place, that a person can still be a practicing homosexual and be involved in a heterosexual relationship. The Court could almost take administrative notice of that fact, based upon some of the individuals mentioned here, an Episcopalian bishop, and so it is not in the opinion of the Court applying the Court's common sense and knowledge of the ways of the world that a person can be married and still be a homosexual. I do find that the respondent is a homosexual.

With respect to his testimony concerning the offenses that he has committed, it is the opinion of the Court that the respondent in his testimony, although I have found him to be basically credible,

that he attempted to minimize his involvement in these very serious offenses for which he stands convicted.

Therefore, it is the opinion of the Court with respect to the main issue in this case, whether or not the respondent is a homosexual, that he has met his burden to prove that he is a homosexual. With respect to a nexus between the respondent being a homosexual and his application for relief under the provisions of Section 241(b)(3) withholding of removal, it is the opinion of the Court that the respondent is a member of a particular social group, and the case cited by the Government attorney would be the applicable case, *Matter of Toboso-Alfonso,* Int. Dec. 3222. That case has held that an applicant who had the status of being a homosexual both established his membership in a particular social group and demonstrated that his freedom was threatened within the meaning of the Act. So it is the opinion of the Court that the respondent is a member of a particular social group.

Now with respect to the relief of withholding of removal, as I stated, there is a nexus, however, the law does provide that if the respondent is convicted of a particularly serious crime that the respondent is not statutorily eligible for withholding of removal under the Act. The law provides that if a respondent receives a sentence of five years or more that that would conclusively make that crime a particularly serious crime and a danger to society. However, that is just one element. A person can still be guilty of committing particularly serious crimes if the sentence

is less than the five years. It is the opinion of the Court that one of the crimes in which the respondent was convicted, using, carrying and possessing a firearms during a drug trafficking offense in violation of 18 U.S.C. Section 924(c)(1)(A)(i), is considered by this Court to be a particularly serious crime. He received 27 months for that particular offense.

I also have taken into consideration in evaluating whether respondent is a danger to the community the fact that he also had in his possession or at least in his home a pistol, a shotgun, assault rifles, three handguns and also the large amount of marijuana that he was convicted of possessing, and the fact, it is an aggravating factor, he testified that he did not use marijuana, the fact that he at least passed that marijuana onto others would make him a danger to society. I have also taken into consideration that he has changed vehicle registrations on numerous occasions and used aliases on numerous occasions. Therefore, it is the opinion of the Court that the respondent has committed a particularly serious crime.

With respect to withholding of removal under the provisions of Article 3 of the United Nations Convention against Torture, although that particular offense does not require a nexus to any of the five grounds, it is the opinion of the Court that the respondent has been convicted of a final judgement of a particularly serious crime and is a danger to the community, and, therefore, respondent would not be eligible for the

relief of withholding of removal under the Convention against Torture.

With respect to deferral of removal, it is the opinion of the Court that the respondent has met his burden to prove that it would be more likely than not that he would suffer torture if removed to Jamaica. I have taken into consideration the background documents submitted by the respondent in the nature of articles, but most importantly the *Country Reports for Human Rights Practices* published by the State Department on March 8, 2006. That report states that the offenses against the person's act prohibit acts of gross indecency, generally interpreted to be any kind of physical intimacy between men in public or in private, which are punishable by ten years in prison. Although Prime Minister Patterson stated that the country would not be pressured to change its antihomosexual laws, in October a parliamentary committee met and proposed a debate on that issue. The report also goes on to list individuals who were homosexuals who were killed, and also that in December a homophobic mob allegedly chased a homosexual off a pier where he drowned.

I have also taken into consideration the fact that I did find credible that the respondent was chased and beaten by an antihomosexual mob and that he would have no recourse to the government of Jamaica. I have also taken into consideration, with respect to the State Department *Report* section on torture, that although the law prohibits such practices, reports of physical abuse of prisoners by guards

continued despite efforts of the government to remove abusive guards and improve procedures. This lists instances where individuals who are apprehended and detained are tortured. It is the opinion of the Court that if the respondent were returned to Jamaica that it would be more likely than not based upon his history as being a homosexual that he would commit homosexual acts and would be subject to imprisonment for that act and tortured.

ORDER

Accordingly, the application for withholding of removal under the provisions of Section 241(b)(3) is denied.

The application for withholding of removal under the provisions of Article 3 of the United Nations Convention against Torture is denied.

The application for deferral of removal under the provisions of Article 3, the United Nations Convention against Torture is granted.

WAYNE R. ISKRA
Immigration Judge

APPENDIX D

FILED: November 21, 2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1838
(A41-830-049)

PAUL ANTHONY RANGOLAN,

Petitioner

v.

MICHAEL B. MUKASEY, Attorney General,

Respondent

ORDER

The Court denies the motion for stay and the petition for rehearing and rehearing en banc. No poll was requested on the petition.

Entered at the direction of Judge Niemeyer with the concurrence of Judge Traxler. Judge Gregory voted to grant the motion for stay and petition.

For the Court

/s/ Patricia S. Connor, Clerk

[SEAL]

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals,
Office of the Clerk
P.O. Box 8530
5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Leon Fresco, Esquire
701 Brickell Ave., Ste. 300
Miami, FL 33131

Office of the District Counsel/PIS
P.O. Box 1711
Harlingen, TX 78551

Name: [redacted]

A# [redacted]

Date of this notice:
12-18-2007

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna M. Carr
Chief Clerk

Enclosure

Panel Members:
Lauri S. Filppu
Roger Pauley
Patricia A. Cole

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

File: [redacted] – Los Fresnos, TX Date: DEC 18 2007

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF
OF RESPONDENT: Leon Fresco, Esquire

ON BEHALF OF DHS: Dona J.F. Justus
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture; voluntary departure

In a decision dated May 4, 2007, an Immigration Judge found the respondent removable as charged and denied his applications for asylum, withholding of removal, protection under the Convention Against Torture, and for voluntary departure. The respondent's appeal of that decision will be sustained in part and dismissed in part.

On appeal, the respondent argues that the Immigration Judge erred in not granting him an exception

to the 1-year asylum application filing requirement because he established that he suffers from Post Traumatic Stress Disorder (PTSD) due to his violent harassment and the shooting he experienced in Jamaica on account of his homosexuality. *See* 8 C.F.R. § 1208.4 (2007). The Immigration Judge did not find the respondent's assertions about his medical condition to be incredible and also took into consideration the testimony of respondent's doctor (I.J. at 9-10, 30); however, he found that the respondent had failed to file a timely asylum application because he did not know about such relief and because he failed to obtain legal counsel at the time of his arrival (I.J. at 30).

The respondent contests this determination on appeal, asserting that the Immigration Judge's decision failed to take into consideration the doctor's testimony and also erroneously relied on a case from the United States Court of Appeals for the Eighth Circuit (Respondent's Br. at 14-15 (citing *Molathwa v. Ashcroft*, 390 F.3d 551 (8th Cir. 2004))). Furthermore, because the Immigration Judge found the respondent and all of his witnesses credible, according to the respondent, he also should have credited their testimony that the respondent's failure to file an asylum application within 1 year of arrival was due to mental illness (Respondent's Br. at 15).

We agree with the respondent that to the extent the Immigration Judge appears to have relied on *Molathwa v. Ashcroft, supra,* that case does not support his decision (*see* I.J. at 30-31). The alien in

Molathwa, supra, did not suffer from PTSD and the Eighth Circuit determined only that it did not have jurisdiction to review the determination that the application was not timely filed. *Id.* at 553. *See* section 208(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(3). The case offers no grounds upon which to find the respondent statutorily ineligible for asylum.

However, we are not prepared to find clear error in the Immigration Judge's factual determinations leading to his decision finding the respondent statutorily ineligible for asylum. As noted by the Immigration Judge, the record contains different explanations for why the respondent did not timely file an application (I.J. at 28-31). The Immigration Judge notes that the respondent's original asylum application indicated that he did not know about asylum (I.J. at 28-29); his amendment, which the Immigration Judge admits supersedes the original, references the trouble he experienced due to his experiences in Jamaica and that the result has been a diagnosis of PTSD (I.J. at 29-30). The Immigration Judge then notes that the respondent testified both that he did not know he could file for asylum when he first arrived here and also feared returning to Jamaica (I.J. at 30).

Based on the respondent's statements, we cannot find clear error in the Immigration Judge's finding that the respondent failed to establish that PTSD caused his late filing, as opposed to failing to file simply because he was not aware of the relief. The respondent simply has not shown that he likely would

have learned about asylum and applied within 1 year had he not suffered from PTSD. As correctly noted by the respondent, the Immigration Judge found the respondent and his witnesses credible (Respondent's Br. at 23; I.J. at 28). Like the Immigration Judge, we do not find that this testimony or other evidence from the respondent's expert witness provides a direct link between his PTSD and his actions or inactions that would account for the late-filing of the asylum application.

We do not doubt that suffering from PTSD can affect one's life in many ways. However, it is the respondent's burden to establish that extraordinary circumstances led to his inability to file a timely application. *See* 8 C.F.R. § 1208.4(a)(5)(i), (ii); *see also Mukamusoni v. Ashcroft*, 390 F.3d 110, 117 (1st Cir. 2004) (noting that the Immigration Judge had excused the alien's late filing of the asylum application because she was diagnosed with PTSD which left her debilitated with fear and anxiety). We are not convinced that the respondent was debilitated in such a way that his medical condition prevented him from completing and submitting an asylum application.

Although the respondent is statutorily ineligible for asylum, he remains eligible for withholding of removal. The Immigration Judge assumed that the respondent's homosexuality qualified as membership in a particular social group and that he had been harmed on account of his sexual orientation (I.J. at 31), but he denied the respondent's claim for withholding of removal because the respondent had never

been harmed, threatened, or harassed by the government of Jamaica (I.J. at 31-34). The Immigration Judge also pointed out that the respondent had not reported the incidents of harm to the police except for the time he was shot and there was no evidence that this incident was not fully investigated by the police (I.J. at 31-32).

We cannot agree with the Immigration Judge's conclusion that the respondent has failed to show past persecution. In particular, we note that while the Immigration Judge's decision clearly summarizes the evidence presented by the respondent (I.J. at 9-28), his analysis does not appear to weigh in all of the important aspects of the evidence when deciding that the respondent failed to meet his burden of proof (*see* I.J. at 31-38). The Immigration Judge concludes that the there are instances in Jamaica where police and other public officials commit acts of violence against homosexuals or do not investigate violence by private citizens, but that these are "rogue police officers" and the "respondent has not shown that it is more likely than not that respondent would suffer persecution by any Government agent in Jamaica" (I.J. at 37-38). We do not agree.

The respondent was shot because of his homosexuality. Further, the record documents violence towards homosexuals by public officials and private citizens who are not brought to justice. The police are not generally inclined to help homosexuals because a homosexual is considered a *persona non grata*. The evidence of societal and governmental bias would not

enable DHS to rebut the presumption arising from past persecution, such that a grant of withholding of removal is mandated. Accordingly, we decline to address the respondent's claim for protection under the Convention Against Torture and also find no grounds upon which to remand in order to allow, as requested, the respondent to submit additional evidence.

ORDER: The respondent's appeal is sustained in part and dismissed in part.

FURTHER ORDER: The Immigration Judge's decision finding the respondent statutorily ineligible for asylum is affirmed.

FURTHER ORDER: The Immigration Judge's decision finding the respondent ineligible for withholding of removal is vacated.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).

/s/ Lari Filppu
FOR THE BOARD

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

File: [redacted] – Los Fresnos, TX Date: DEC 18 2007

In re: [redacted]

CONCURRING/DISSENTING OPINION:
Patricia A. Cole, Board Member

I agree with the majority that the respondent is eligible for withholding of removal. I write separately, however, because I would also find the respondent eligible to apply for asylum in that he has established that his medical condition entitles him to an exception to the 1-year filing bar.

Although there were different explanations provided for why the respondent did not timely file an application (I.J. at 28-31), it is not clear that the respondent's medical condition did not contribute to his inability to gain information about United States asylum laws. As correctly noted by the respondent, the Immigration Judge found the respondent and his witnesses credible (Respondent's Br. at 23; I.J. at 28). While the respondent does not provide a clear picture of mental disability preventing his timely filing which would give rise to an exception to the 1-year filing bar, the respondent's doctor provides more concrete explanations of the respondent's mental state and provides evidence of a condition that would clearly impact a person's ability to seek out legal aid and even human contact.

For example, Dr. Linskey, a clinical psychologist who examined the respondent, testified that the respondent suffered from feelings of intense psychological distress and fear due to his experiences in Jamaica, and that this would lead him to avoid any situations which might promote the type of hostility he had previously encountered on account of his homosexuality (Tr. at 28-31). In light of this evidence, I would find clear error in the Immigration Judge's conclusions regarding the reason why the respondent failed to file a timely application for relief and, therefore, I would find that he has established grounds for an exception to the 1-year filing requirement. 8 C.F.R. § 1208.4(a)(5)(i), (ii) (2007); *see Mukamusoni v. Ashcroft*, 390 F.3d 110, 117 (1st Cir. 2004) (noting that the Immigration Judge had excused the alien's late filing of the asylum application because she was diagnosed with PTSD which left her debilitated with fear and anxiety). I would then remand proceedings in order for the Immigration Judge to reassess the respondent's eligibility for asylum.

/s/ Patricia A. Cole
Patricia A. Cole
Board Member

APPENDIX F

EMBASSY OF JAMAICA
1520 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036
TELEPHONE: (202) 452-0660
FACSIMILE: (202 452 0081

January 18, 2006

Mr. Paul Rangolan
1435 North Courthouse Rd.
Arlington, VA 22201

Dear Mr. Rangolan:

This serves to acknowledge receipt of your letter dated December 17, 2005 addressed to the Ambassador in which you expressed your concerns about returning to Jamaica. I have noted these concerns; however, neither the Ambassador nor myself can intervene to prevent the United States government from deporting you.

I have gleaned from your letter that you are afflicted with HIV Aids and your sexual preference is not compatible with the opposite sex. Consequently, you have alleged that persons armed with machetes in Jamaica chased you. Please bear in mind that your sexual orientation is still a breach under Jamaican laws; nonetheless, an attack on your person should have been reported to the police. You will have to conceal your sexual body language to prevent future assault as you move around.

Unfortunately, I cannot accede to your request to withhold a travel document from US Immigration. Your HIV status is not grounds for refusing to issue a travel document either. I wish to advise that systems are in place in Jamaica to assist persons with HIV Aids; for example, treatment is available, the medication can be accessed at a reduced rate and counseling is also available. These resources will enable you to live a normal life.

I am suggesting that you contact your relatives here in the United States and mobilize their support to enhance your welfare on your return to Jamaica. If you have the evidence to challenge your removal on humanitarian grounds, I implore you to go for it. Good luck in your endeavour to remain in the United States.

Yours sincerely,

/s/ Ahan Brown
Ahan G. Brown
Security Attaché

APPENDIX G

REASONABLE FEAR DETERMINATION

ALIEN NUMBER: A41 830 049	**INTERVIEW DATE: 14 Dec 2006**
NAME: RANGOLAN, Paul Anthony	**ASYLUM OFFICER: ZAR 145**
COUNTRY: Jamaica	**REVIEWING SAO: ZAR 139**
ASYLUM OFFICE: ZAR	**LOCATION: DHS,ICE,WAS,DRO**

Background

The applicant indicated that he is a 42 year-old native and citizen of Jamaica, who last entered the United States with a legal permanent residence card on 20 March 1999. The following has been ascertained from information in the applicant's file[1] and from the applicant's testimony. On 19 September 2006, the United States District Court for the District of Columbia convicted the applicant of (1) Using, Carrying & Possessing A Pistol During A Drug Trafficking Offense, and (2) Illegal Reentry Of An Alien Following Conviction For An Aggravated Felony, in violation of 18 USC 924(c)(1)(A) and 8 USC 1326(a), respectively. The total sentence was "Time Served"

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[1] Please note that it appears that A27 959 830 (located at NRC, and requested expeditiously on 26 December 2006) must be consolidated with the applicant's primary file, A41 830 049 (already consolidated with A28 371 000).

given that the applicant cooperated with agencies in an ongoing investigation.[2] Thus, the applicant has a final conviction of an aggravated felony as defined in sections 101(a)(43)(B) and (O) of the INA, 8 USC 1101(a)(43)(B). The Immigration Judge ordered the applicant deported on 21 December 1998. And, the applicant was removed from the United States on 13 January 1999. However, the applicant illegally reentered the United States on or about 1 March 1999. Previously, the applicant was detained at the Piedmont Regional Jail in Virginia. Subsequently, the applicant has been relocated to the Hampton Roads Regional Jail in Virginia. On 28 September 2006, ICE served Notice of Intent/Decision to Reinstate Prior Order on the applicant pursuant to 241(a)(5) of the

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[2] According to Form I-831, Record of Deportable/Inadmissible Alien, on 27 February 2005, the applicant pleaded guilty to a violation of 18 USC 922. And, on 19 January 2006, the court sentenced, in relevant part, the applicant to imprisonment for twenty-seven (27) months. Additionally, Form I-831 indicated that the applicant completed his 27-month incarceration. Please note that pages three (3) and six (6) of the court disposition were missing from the A file. Also, please note that on 16 March 1990, the United States District Court for the District of Columbia convicted the applicant of Embezzlement [B]y [A] Bank Employee, in violation of 18 USC 656. The court sentenced, in relevant part, the applicant to "probation for a term of five (5) years with credit for time served". Further, please note that on 24 February 1997, the United States District Court for the District of Maryland convicted the applicant of Conspiracy [T]o File False Tax Returns, in violation of 18 USC 286. The court sentenced, in relevant part, the applicant to imprisonment for twelve (12) months and one (1) day as well as to pay restitution to the United States Internal Revenue Service.

INA. Because the applicant expressed a fear of return to Jamaica, he was referred to the Arlington Asylum Office in Arlington, Virginia, for a reasonable fear determination on 8 November 2006. A reasonable fear orientation was completed with the applicant on 9 November 2006, at which time the applicant indicated that his representative was Linda DOMINGUEZ. ZAR interviewed the applicant at the DHS/ICE Washington District Office on 14 December 2006, in connection with his reasonable fear claim.

The applicant expressed a fear that private individuals in Jamaica will harm, kill or torture him on account of his membership in a particular social group (effeminate Jamaican men who have an actual or perceived homosexual orientation). The applicant believes that such harm or death will occur with the approval or insistence of authorities for the government of Jamaica.

Testimony

The applicant testified that he is a citizen and a national of Jamaica with permanent residence in the United States as the spouse of an United States citizen.[3] The applicant indicated that he initially entered the United States without inspection between

[3] The applicant is unaware whether he remains married legally to the United States citizen spouse.

1982 and 1984.[4] The applicant remained in the United States until 13 January 1999, when United States immigration officials removed the applicant to Jamaica pursuant to an Immigration Judge's Order of Removal issued on 21 December 1998. The applicant remained in Jamaica until on or about 1 March 1999, when the applicant returned to the United States.[5]

While in Jamaica from about January 1999 until about March 1999, the applicant indicated that he resided with a brother in Kingston. Neighbours inquired of the applicant's brother whether the applicant is an homosexual given the applicant's effeminate appearance, speech and walk. The applicant's brother always replied in the negative. However, the neighbours continued to question the applicant's brother about the applicant's sexual identity. Consequently, the applicant left his brother's residence and moved to Half Tree House in central Kingston, an area commonly known to be frequented by homosexuals.

Between January and February 1999, about thirty (30) individuals surrounded the applicant and his

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[4] Review of the applicant's A file revealed that the applicant previously indicated that he entered the United States with inspection on or about 1 January 1983 via Miami, Florida, with permission to remain in the United States as a visitor for about three (3) weeks.

[5] The applicant indicated that he presented his legal permanent residence card to United States immigration officials at Miami, Florida, to make an entry into the United States.

friend, shouting derogatory references to homosexual individuals and cutting the applicant on his left arm as well as injuring the applicant's friend's head. The applicant and his friend escaped from the group of assailants and received medical assistance. Then, the applicant made arrangements to return to the United States via the Bahamas. Subsequently, the applicant's sister informed the applicant that neighbours who questioned the applicant's sexual orientation accosted and shot the brother with whom the applicant lived from around January to March 1999 because of the applicant's sexual orientation. The applicant's brother died on 22 July 1999.

Analysis

To establish a reasonable fear of persecution, an applicant must establish that there is a reasonable possibility that he would be persecuted on account of his race, religion, nationality, membership in a particular social group, or political opinion in the country to which he has been ordered removed. To establish a reasonable fear of torture, an applicant must establish that there is a reasonable possibility that he would be subjected to torture in the country to which he has been ordered removed, as defined in the Convention against Torture and the United States regulations.

Credibility

Although there were initial concerns of the applicant's Jamaican citizenship and nationality because of the applicant's oral testimony at the reasonable fear interview[6], the applicant's level of education and fluency in the English language, subsequent evidentiary documentation obtained by ICE officials indicate that the applicant is a citizen of Jamaica. Specifically, a Birth Registration Form indicated that the applicant was born at the University College Hospital of the West Indies, located in Mona, St. Andrew Parish, Jamaica, on 19 March 1964. Additionally, a statement by the Assistant Commissioner

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[6] An initial search of the applicant's primary A file failed to indicate that the applicant had any identity documents such as a birth certificate, passport or national identity card. Thereby, the Asylum Pre-Screening Officer ("APSO") asked the applicant questions that would assist the applicant in establishing his Jamaican identity. Specifically, the APSO asked the applicant for: (a) the geographical location of the applicant's hometown, Kingston, (b) a description of the Jamaican flag, (c) the title of the Jamaican national anthem, (d) any words to the Jamaican national anthem, (e) the name of the current president of Jamaica and (f) Jamaica's date of independence. When provided an opportunity to respond to each of these questions, the applicant responded in the negative; he did not know the answer to any of these questions (please note that the applicant correctly indicated that the Jamaican flag does contain the colour "black"). When asked why the applicant was unable to provide a response to the aforementioned questions given that the questions were civic questions that any national and citizen of Jamaica should know, the applicant only responded that, "I just do not remember. I just choose not to remember anything about Jamaica, period."

of Police of the Jamaica Constabulary, issued to the American Consulate in Mexico, indicated that the applicant is a native of Jamaica, born on 19 March 1964. In light of this additional evidentiary documentation used by ICE officials to remove the applicant from the United States to Jamaica in 1999, the applicant's overall testimony concerning his Jamaican citizenship is deemed to be credible. Additionally, the applicant's testimony concerning events that happened to him in Jamaica in 1999, resulting in his reasonable fear of persecution on account of his membership in a particular social group (effeminate Jamaican men who have an actual or perceived homosexual orientation), is deemed to be credible.

Applicant's Past Mistreatment

The events described by the applicant amount to past persecution. The applicant testified that a group of 30 unknown individuals taunted him with derogatory terms and cut him on his left arm sometime between January and February 1999 because of the applicant's homosexual orientation. The applicant did not report the incident to the Jamaican authorities because the authorities have not been responsive to investigations of acts targeting homosexuals. Also, the applicant indicated that his brother's neighbours killed the brother in July 1999 because of the applicant's homosexual orientation. Thus, the harm suffered by the applicant and his family member rises to the level of persecution.

Applicant's Risk of Being Persecuted or Tortured

A preponderance of the evidence fails to establish that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution if he were to return to Jamaica. Credible country conditions reports indicate that:

> The Jamaica Forum for Lesbians, All Sexuals, and Gays (J-FLAG) continued to report allegations of human rights abuses, including police harassment, arbitrary detention, mob attacks, stabbings, harassment of homosexual patients by hospital and prison staff, and targeted shootings of homosexuals. Police often did not investigate such incidents. J-FLAG documented a number of instances of homophobic violence during the year, some of which resulted in charges brought to court, while others were never reported to authorities by reason of fear . . . male inmates deemed by prison wardens to be homosexual are held in a separate facility for their protection. The method used for determining their sexual orientation is subjective and not regulated by the prison system . . . Homosexual men were hesitant to report incidents against them because of fear for their physical wellbeing. Human rights NGOs and government entities agreed that brutality against homosexuals, both by police and private citizens, was widespread in the community. *Country Reports on Human Rights*

Practices 2005, Jamaica, U.S. Department of State, http://www.state.gov/g/drl/rls/hrrpt/2005/61733.htm, [last accessed 26 December 2006].

. . . Others tell tales of police stopping cars full of men at night and harassing them with homophobic insults . . . there is no openly acknowledged gay social space in Jamaica. Not one bar, nightclub or café where same-sex couples can meet openly without the threat of violence . . . For the most part Jamaica seems to function socially on a 'Don't ask, don't tell' policy when it comes to sexual orientation . . . To navigate this minefield you have to act straight or at least not too gay . . . in Jamaica the stakes are higher. Let your mask slip in the wrong place or at the wrong time and you could find yourself at the mercy of the mob. *Troubled Island, Guardian,* 27 April 2006, http://www.guardian.co.uk/print/0,,329466084-103390,00.htm, [last accessed 26 December 2006].

'Police abuse prompting violence against men perceived to be homosexual: 'The two male officers started to beat the man with batons. I turned to the female officer and asked, 'What has he done wrong?' She turned to me and said, 'Everyday [w]e have to warn people about this guy coming on the beach. I'm going to lock him up.' I said, 'For what?' She didn't say. The two policemen said, 'Beat him because him a battyman [homosexual].'

– Fred L., 30, who witnessed police beating a man perceived to be gay and then urging others

> to beat him because he was homosexual on June 18 2004 in Montego Bay. The man fled the police and according to local accounts, was chopped, stabbed, and stoned to death by a crowd. *Testimonies from "Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic"*, Human Rights Watch, http://hrw.org/english/docs/2004/11/16/jamaic9674.htm, [last accessed 10 January 2007].

A preponderance of the evidence fails to establish that the applicant could avoid future persecution by relocating within his country and that, under all the circumstances, it would be reasonable for him to do so. As referenced in the aforementioned credible country conditions reports, the threat of persecution exists countrywide because the applicant's persecutors are private individuals who act with the approval or the insistence of governmental authorities in Jamaica.

Conclusion

For the reasons stated above, the applicant has established a reasonable fear of persecution.